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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 574

In the Matter of RAY SIMON, Individually and RAY SIMON OPTICAL CO., etc., et al., Bankrupt,

ROSCOE BIFOCAL CO., INC., a corporation,
Petitioner,

vs.

RAY SIMON, Individually and as General Partner of RAY SIMON OPTICAL CO.,
Respondent.

Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit

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To the Honorable the Justices of the Supreme Court of the United States:

The undersigned prays that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered November 18, 1954, in the above entitled case, docketed as No. 11166.

OPINIONS BELOW.

The opinion of the Appeals Court has not been officially published. A copy of the same as issued October 1, 1954, is appended to the transcript of record (hereinafter designated by "Tr."). The referee's order dismissing Amended Specifications I (a) and I (b) as of March 31, appears on pp. 95 to 100 of the transcript. The unpublished Memorandum Order of the District Court is on p. 106 of the transcript.

JURISDICTION.

The judgment of the Court of Appeals was entered October 1, 1954; a petition for rehearing was duly filed, and was denied November 18, 1954. The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Sec. 2101 (c).

QUESTION PRESENTED.

1. Is not denial of the Bankrupt's discharge mandatory under Sec. 14 c (7) of the Bankruptcy Act where he fails to meet the burden of proof, once the Objector has made a *prima facie* showing under the proviso of that section?[1]

2. Did Congress intend that a bankrupt's explanation of losses or deficiencies of assets should be held to be satisfactory if based only on vague generalizations and estimates,[2] or, on inconsistent, contradictory and incredible

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[1] **Federal Provision Co. Inc., v. Ershowsky (C.C.A. 2, 1938) 94 F. (2) 574, 575; Sec. 14 c (7) of Bankruptcy Act.**

[2] **Federal Provision Co. Inc., v. Ershowsky (C.C.A. 2, 1938) 94 F. (2d) 574, 575; In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 260, 261; Brenner v. Gaunce (C. C. A. 9, 1928) 28 F. (2d) 606.**

testimony,[3] or on testimony that disclosed suspicious circumstances calling for further explanations which were not forthcoming?[4]

STATUTE INVOLVED.

Section 14 c (7) of the Bankruptcy Act (Amendment of 1926), Title 11 U.S.C.A. Sec. 32 c (7), reads:

> "The court shall grant the discharge unless satisfied that the bankrupt has . . . (7) failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

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[3] **Knetzer v. Larkin (U.S.C.A. 2, 1949) 178 F. (2) 532, 534; In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 260, 261.**

[4] **Shapiro & Ornish (D.C. Tex. 1929) 37 F. (2d) 403, 406,** last paragraph on page; affirmed by Circuit Court of Appeals, 5th Circuit, 37 F. (2d) 407.

STATEMENT OF THE CASE.

Ray Simon filed voluntary petitions in bankruptcy for himself individually and Ray Simon Optical Co., his partnership, on August 6, 1952 (Tr. 1). Since the question of discharge concerns only Ray Simon he will be referred to as "the bankrupt". An order was duly entered adjudging Simon and the partnership bankrupts (a certified copy of the order of adjudication is attached to Exhibit Volume and will be made a part of Record on stipulation or motion filed herewith if the writ is granted). The bankruptcy schedules list unsecured debts in excess of $110,000 most of which as having accrued in the 8¼ months' period prior to bankruptcy (Exhibit Vol. pp. 3-13). Schedule B-2 lists the "Stock in trade" as of the day of bankruptcy as valued at $80,000 (Exhibit Vol. 14). However, the "Statement of Affairs" (Exhibit Vol. p. 15) in paragraph 4 admits that no inventory was taken at the time of bankruptcy.[5] So that the $80,000 entry itself in the bankruptcy schedule would seem to be of no evidentiary value. On the other hand, the "Ray Simon Optical Company Balance Sheet" of August 6 (Tr. 24), (the day of the bankruptcy), contains what purports to be an ordinary business entry, "Merchandise Inventory (Estimated Value) $30,000."

Appellant's Amended Specifications (hereinafter designated "Specifications") of Objections I (a), I (b) and I (c) (Tr. 12-15) each called upon the bankrupt to explain satisfactorily his losses and deficiency of assets to meet his liabilities under Section 14 c (7) of the Bankruptcy Act. The first two specifications were based factually upon the

[5] Paragraph "4" of the "Statement of Affairs" (Exhibit Vol. p. 15) states that the "last inventory" was taken November 1, 1951, at which time the closing inventory was $80,030.38.

1951 Income Tax Return (Exhibit Volume, pp. 1, 2) and the "Ray Simon Optical Company Balance Sheet" of August 6, 1952 (Tr. 24). I (a) charged a shrinkage, or decrease, of over $50,000, in merchandise in 8¼ months. I (b) charged losses of over $60,000 in the same period. Each called for a satisfactory explanation.

Appellant-objector, to make a *prima facie* showing under the proviso of Section 14 c (7) of the Act, introduced these two records, the Income Tax Return for 1951 showing an opening inventory of $80,030.38 as of Nov. 30, 1951 (Exhibit Vol. p. 1), and the "Ray Simon Optical Co. Ballance Sheet of August 6th, 1952" showing a closing inventory of $30,000.00 (Tr. 24). The bankrupt relied wholly on Rudolph Weinberg, the accountant, employed prior to bankruptcy by the partnership, to make the "explanation" required by the Act. Mr. Weinberg testified that he prepared this balance sheet, not for the bankrupt, but for Mr. Murphy, the receiver in bankruptcy (Tr. 22, 56, 57), and that, in it, the entry $30,000.00 "estimated value" of the merchandise as of the day of bankruptcy represented only one-half the cost value of the merchandise (because, he said, the concern was in bankruptcy) less the $10,000.00 of "worthless inventory."

However, aside from serious doubt arising from the fact that Mr. Weinberg admitted in his testimony that this balance sheet had been prepared "in the last week of July or the first week in August" (Tr. 57) which was actually before the receiver was appointed, and longer still before August 13th, when he says he was employed by the receiver (Tr. 22), the following documentary evidence clearly discredits Weinberg's contention that the receiver ever employed him to prepare this balance sheet. The very first item of the balance sheet (as of the day of bankruptcy) is "Cash on Hand, $3,400.00" (Tr. 24). Referring

to bankruptcy Schedule B-2, (Exhibit Volume, p. 14) the first item is "Cash on Hand . . . None." Now referring to the "Receiver's First and Final Account" (contained in the certified Record in the Court below, which will be sent up if the Writ is allowed) we find that although the Receiver's Account was filed several months after bankruptcy, the receiver, had not collected this "Cash-on-Hand" item of $3,400.00. This omission from the Receiver's Account indicates that the receiver had relied on the false entry in the bankruptcy schedule which listed no "Cash-on-Hand", and that he had never even seen the balance sheet, and, of course, had never employed Weinberg to prepare it.[6]

Specification I (c) (Tr. 15) alleged that Ray Simon had admitted shortly after bankruptcy that he owned a one-third interest in Opticon Corporation, which was organized after bankruptcy, and it called upon him to explain satisfactorily that he had used none of the partnership assets to acquire that interest. This specification was stricken on motion of the bankrupt four days before the hearing on objections, (Tr. 25) and the review was taken of this order as well as of the order dismissing Specifications I (a) and I (b). However, at the hearing on the question of discharge, Nathan Scalen (Tr. 69, 70) testified the bankrupt had admitted to him, that he Simon, and two others had "bought out Ray Simon Optical Co." (Tr. 70) and that he, Simon, owned a third interest in Opticon.

The referee recognized that Scalen's testimony made the required showing under the proviso of Sec. 14 c (7), of the Act, and rejected the bankrupt's motion to dismiss

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[6] These contradictory entries were not discovered until after briefs were filed in the Appeals Court, and have not been brought to the attention of the Referee or the District Judge.

all objections at the close of Appellant's case, stating that an explanation should be made as to whether the bankrupt owned a substantial interest in Opticon, and "if so, how he acquired that interest." (Tr. 84).

The bankrupt, in his testimony, while denying generally that he had any interest in Opticon aside from being employed as a traveling salesman at $125 per week (Tr. 85), admitted that his wife, Sadie, had borrowed $3,600.00 on $52,000.00 of life insurance, which he said he had assigned to her when it was first taken out (Tr. 88, 89). These policies were not listed in his individual bankruptcy Schedule D-3-b (Tr. 91, and Exhibit Vol. p. 16).[7] The bankrupt assets were purchased in the name of Herman Silver, a certified public accountant (Tr. 88, 5), who was said to have advanced $15,000, of the $22,250.00 purchase price (Tr. 88). No documents evidencing the insurance, the assignments, the loan, or any corporate records of Opticon, were offered in evidence to corroborate his testimony.

The referee, at the close of the evidence, made no findings on the evidence under I (c), but found solely on Mr. Weinberg's testimony that as an employee of the Receiver, he had prepared the balance sheet, and that the $30,000 closing inventory value was a liquidating value only (Tr. 99); that the correct closing inventory was not $30,000, but $80,000.00, and accordingly that there was no shrinkage of inventory, and only about $11,000 of losses in the 8¼ months' period. (Tr. 98).

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[7] The entry in Bankruptcy Schedule D-3-b was in these words: "Policies of Insurance, None."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The court below has decided questions arising out of Sec. 14 c (7) of the Bankruptcy Act, which have not, but should be, decided by this court.

Appeals involving "explanations" under 1926 amendment have been reported in only four circuits, including ours.

2. The court below misconstrued and misapplied the proviso of Sec. 14 c (7) which provides that, once the objecting creditor has shown "there are reasonable grounds for believing" a satisfactory explanation is required under this section, "the burden of proving" the contrary "shall be upon the bankrupt."

FIRST. The opinion of the Court below, in par. 3, restates with approval the Referee's finding "that no evidence had been introduced which showed any shrinkage or decrease between the two dates," (*i.e.* December 1, 1951 and August 6, 1952, the day of bankruptcy). But Sec. 14 c (7) placed absolutely no burden on appellant-objector to produce this evidence of shrinkage under Specification I (a) beyond the mere showing that there were "reasonable grounds for believing" a shrinkage of over $50,000.00 existed. On the contrary, it did place the burden on the bankrupt "to explain satisfactorily" and disprove the shrinkage, which was not even attempted except for Mr. Weinberg's contradictory and incredible testimony.

We made the requisite *prima facie* showing by introducing the Income Tax Return for the fiscal year ending November 30, 1951, which showed an opening inventory of $80,030.38, and the "Ray Simon Optical Co. Balance Sheet" as of the day of bankruptcy, showing "Merchan-

dise Inventory (Estimated Value) $30,000.00" (Tr. 24) which Mr. Weinberg tried to explain was one-half the cost value of the merchandise, or what he termed the "liquidating value" of it (Tr. 56, 57), less $10,000 of worthless merchandise. But the tell-tale entry in the balance sheet of $3,400.00 "Cash on Hand", which was not collected by the receiver, shows conclusively that the latter never employed him to make the balance sheet, else he would have collected that $3,400.00 "Cash on Hand". Since Mr. Weinberg was not employed by the Receiver to prepare the Balance Sheet, there was no reason or excuse for his setting up a "liquidating", or any other but the correct value of the inventory. Appellant having made the requisite *prima facie* showing of "reasonable grounds for believing", and the bankrupt having failed to "explain satisfactorily", under the proviso of Sec. 14 c (7) of the Act, denial of his discharge necessarily followed. But the referee disregarded this proviso, and the courts below have approved the Referee's order, thus nullifying in the Seventh Circuit, this Section of the Bankruptcy Act.

SECOND. Par. 4 of the opinion of the court below reads in part: "Obviously it is not for us to accept such inferences" (that the bankrupt was actually the owner of the interests in Opticon standing in the name of Mrs. Simon and Mr. Silver) (Parenthesis ours). But Sec. 14 c (7) placed no burden whatever on appellant-objector to prove these inferences.[8]

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[8] Circumstances disclosed by Simon's testimony giving rise to natural inferences of his probable ownership of 5/6 interest in Opticon: (a) The fact that the $3600 interest is admitted to have been taken in the name of the bankrupt's wife, **Bartel v. Zimmerman (1920) 293 Ill. 154, 163; Reisch v. Bowie (1937) 367 Ill. 126, 132;** (b) The inference arising from the secrecy of the transaction —the false entry in the bankrupt's schedules D-3-b (Exhibit Vol.

On the contrary, the burden under the Act, was absolutely the bankrupt's to satisfactorily explain-away all detracting or derogatory inferences. Instead of so doing, however, his explanation gave rise to other more serious natural inferences under Specification I (c). *Shapiro* v. *Ornish* (D.C. Tex. 1929) 37 F. (2d) 403, 406 (last par. on page) affirmed by Circuit Court of Appeals, 5th Cir. 37 F. (2d) 407).

THIRD. Par. 5 of the Court below, reads in part: "Appellant insists that the evidence indicates that the wife of the bankrupt acquired an interest in Opticon Corporation with funds supplied by her husband . . . Unfortunately, the evidence does not justify such a postulate." But Sec.

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16)—"Policies of insurance, None" which, as a practical matter, closed the door to inquiry concerning them, **Maxwell, Trustee v. Adams (1931) 130 Me. 230; 154 Atl. 904, 906.** There was further secrecy in that the order approving the sale named only Herman Silver as the purchaser, not disclosing that the bankrupt's wife was a co-purchaser. (Tr. 5) (c) The natural inference arising from failure of the bankrupt to support his testimony, consisting largely of conclusions, by documentary evidence, such as the policies of insurance—written assignments of the same, checks evidencing the insurance loans,—the certificate of stock,—the stock subscription agreement, and corporate records, **In re Smatlak (C.C.A. 7) 99 F. (2d) 687, 690; Hubbard v. Allen (1877) 59 Ala. 283, 300;** (d) The natural inference from the fact that the ostensible owners of a 5/6 interest in Opticon, Mrs. Simon and Herman Silver the certified public accountant, were not shown to have any knowledge of the optical business while Simon the ostensible employee, was the expert. **Best v. Fuller (1900) 185 Ill. 43, 51;** (e) The inference arising from the fact that neither Mrs. Simon nor Mr. Silver were called by the bankrupt to testify, **Knetzer v. Larkin (C.C.A. 2, 1949) 178 F. (2d) 532, 534,** in which the court says: "Mrs. Larkin might have produced witnesses to corroborate her explanation . . . or could have at least explained her failure to call them." (last paragraph); **In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 261** (last sentence of opinion).

14 c (7) placed absolutely no burden on appellant to prove that Mrs. Simon held an interest in Opticon in secret trust or otherwise for the bankrupt. On the contrary, this section placed the burden on the bankrupt "to explain satisfactorily", and to disprove the natural inferences arising from the suspicious facts he related, or be denied the discharge. But instead of satisfactorily explaining, he merely disclosed a number of suspicious circumstances, which have been judicially designated "badges of fraud", each of which called desperately for further explanations which were not forth-coming. This certainly rendered his explanation under I (c) legally unsatisfactory.

FOURTH. The final sentence of the opinion reads: "If Appellant desired to pursue the inquiry further than the bankrupt's unequivocal testimony (in regard to the rights of creditors in the $52,000.00 of life insurance) it was incumbent upon it (Appellant) to plead the matter in the trial court and avail itself there of such controverting evidence as it could procure from the insurance companies or elsewhere." (Parenthesis ours). But Sec. 14 c (7) placed no burden whatever on Appellant to prove anything in regard to the rights of the bankrupt estate in the $52,000 of life insurance. That issue was not before the court. After we showed "reasonable grounds for believing" that the bankrupt had secretly used funds that should have gone into his estate, the burden shifted to the bankrupt to "explain satisfactorily" and to prove that he was not guilty, or be denied his discharge under Specification I (c).

It will be seen, therefore, that the effect of the opinion of the court below was to nullify the proviso of Sec. 14 c (7) of the Bankruptcy Act. Contrary to Congressional intent, the opinion below places the burden of proof in dis-

charge procedures back where it was prior to the amendment of 1926, *i.e.* on the objector, who usually cannot know facts, and cannot prove them. It was the intention of Congress to remedy this previously unfair situation, and to place the burden on the bankrupt, who has caused the failure, who knows the facts, and who can easily explain them.

3. The decision of the Court below is squarely in conflict with Courts of Appeal of the Second, Fifth and Ninth Circuits, upon the character of evidence required to render an explanation legally satisfactory under the Act.

FIRST. Courts of Appeal of the Second Circuit have held that an explanation based on conflicting, inconsistent and incredible statements is not satisfactory. The court in *Knetzer* v. *Larkin* (178 U.S.C.A. 2, 1949) 178 F. (2d) 532, 534, so held saying: "her (the bankrupt's) testimony is so contradictory and incredible, she failed to carry her burden of proof." To the same effect is *In re Sperling,* (C.C.A. 2, 1934) 72 F. (2d) 259, 260, 261.

Mr. Weinberg, the bankrupt's accountant, was relied on solely to make the explanation under specification I (a) which charged shrinkage of inventory from $80,030.38 on December 1st, 1951, to $30,000.00 as of the day of bankruptcy as set out in the "Ray Simon Optical Balance Sheet" of August 6. His scheme was to explain that he was employed by the receiver, Mr. Murphy, to prepare this balance sheet to show the *liquidating, instead of the actual,* value of the merchandise as of the day of bankruptcy.

But documentary evidence in the record, the entry of "Cash on Hand $3,400.00" in the balance sheet, and the absence of any cash on hand collected by the receiver conclusively shows this story to be false and wholly incredible.

Mr. Weinberg's story of being employed by the receiver to prepare this balance sheet was merely a clever device to enable him to attempt to reconcile the $80,000 figure adopted by the bankrupt as a safe and self-serving amount for the closing inventory in the partnership bankruptcy schedules,[9] and the $30,000 set up in the balance sheet which he says was one-half the cost value of salable merchandise, or the "liquidating" value.

The Court below, in approving an explanation based on incredible testimony containing inconsistencies [10] and

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[9] The fact that $80,000.00 is substantially the same as the opening figure of $80,030.38 at once arouses strong suspicion that it was adopted merely to avoid the charge of shrinkage, and is purely self-serving, especially, since no physical inventory was actually taken at the time of bankruptcy.

[10] A glaring inconsistency appears in Mr. Weinberg's formula by which he attempted to reconcile the two closing inventory figures; $80,000.00 in partnership schedules B-2-c and $30,000 set-up by him in the "Ray Simon Optical Co. Balance Sheet." He claimed that there was $10,000 of worthless merchandise in the inventory. But instead of deducting this $10,000 of worthless merchandise from the $80,000 which the bankrupt had adopted in Schedule B-2-c as the closing figure, Mr. Weinberg divided the $80,000 first by 2 (to arrive at its value in bankruptcy, since the receiver had told him "anything being liquidated does not bring the return of a going business" (Tr. 56); then he subtracted the $10,000 worthless inventory—not from the entire amount—but from the half—$40,000.00—which gave him the desired $30,000 as the figure for his balance sheet. He repeats this inconsistent, illogical and unmathematical process on p. 57 of the Transcript. Mr. Weinberg was a mathematician and an accountant. This glaring inconsistency cannot be charged to stupidity, but rather to his willingness to deceive the Court and others, knowing that they would be unlikely to analyze his formula while he was testifying.

contradictions[11] is, therefore, in hopeless conflict with the Court of Appeals in the Second Circuit.

SECOND. The judgment of the Court below in approving as satisfactory, explanations given only in the most vague and general terms, is in conflict with courts of appeal in the Second and Ninth Circuit. As holding that such explanations are not "worthy the name", see, *Federal Provision Co.* v. *Ershowsky* (C.C.A. 2, 1938) 94 F. (2d) 574, 575; *In re Sperling* (C.C.A. 2, 1934) 72 F. (2d) 259, 261, in which the court said: "We think Congress meant to require much more in the way of explanation than vague generalities." See also, *Brenner* v. *Gaunce* (C.C.A. 9, 1928) 28 F. (2d) 606.

The bankrupt's entire explanation in response to specification I (a) charging shrinkage in inventory of over $50,000, and I (b), charging losses of over $63,000 in 8¼ months, in addition to being incredible as above stated, was of such general and indefinite character as to place the

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[11] Four days before the hearing, Mr. Weinberg gave an affidavit (Tr. 22) to the effect that he had been employed by the receiver "on or about August 13, 1952" to prepare the balance sheet in question (Tr. 24). But at the hearing he contradicted his affidavit by testifying that he prepared the balance sheet "in the last week of July or the first week in August" (Tr. 57). This admission that he actually prepared the balance sheet **before** bankruptcy is no doubt correct, since this balance sheet was doubtless used to determine whether bankruptcy was the proper course. We may fairly assume, therefore, that it stated the condition of the concern as accurately as he and Mr. Simon were able to determine it.

judgment of the Court below in sharp conflict with the foregoing opinions.[12]

THIRD, the judgment of the Court below is in further conflict with the Courts of Appeal in the Second Circuit in that the explanations were not supported by documentary, or record-evidence,[13] as required by the Court in

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[12] The following taken from the Bankrupt's explanation by Mr. Weinberg on pp. 56 and 57 of the transcript, exposes the lack of definiteness condemned by the Appeals Courts of the Second and Ninth Circuits. "I **worked back** and got the physical inventory by **estimating** the gross profit rate and took **one-half** of that for a **business in bankruptcy,** and knocked off of that what I knew would be a worthless inventory" (which he had explained was **"Possibly eight or ten thousand dollars of merchandise.").**

Q. "What figures did you use to make your computation from?"

A. "I would have to look at the working papers (**which were not in court).** The closing inventory was in the **neighborhood of $80,000.00".**

Mr. Chittick: **"I object, that seems to be a guess"** (Tr. 56).

Q. "Will you tell us how you reached the valuation of $30,000.00 on the balance sheet?" . . .

A. "I got the $80,000.00 figure and **it would bring one half** of the value, **(because it was in bankruptcy)** less the depreciated stock" (Tr. 57). (Parenthesis and emphasis ours).

[13] In the case at bar the important issue under the first two amended specifications hinged entirely upon the amount of the closing inventory. If it were $30,000.00, there was certainly a shrinkage of over $50,000 and losses of over $63,000.00 in 8¼ months. If, on the other hand, the closing inventory was $80,000.00 as contended by Mr. Weinberg in spite of the $30,000.00 entry in the balance sheet, there would be no shrinkage, and the loss would be only approximately $13,000 (or $11,000 as the referee found by accepting, without proof, the $80,000 closing inventory figure). Now the only possible evidence on which the referee could make his findings that the closing inventory was $80,000.00, instead of $30,000.00, is Mr. Weinberg's incredible testimony on pp. 56 and 57 of the transcript above referred to, and the $80,000.00 entry in bankruptcy schedule B-2-c (Exhibit Volume, p. 14) which was merely a self-serving entry.

In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 261. That Court said: The Bankrupt "has accounted very poorly for failure to produce his books and is open to suspicion for leaving his creditors without the ordinary means of verifying the truth of even his vague explanations or definitely showing them to be false."

Mr. Simon had available a quick, easy and practical means of proving the amount of his closing inventory before the Referee if he had chosen to do so. The Receiver's Inventory and the Appraiser's Report had each been introduced in evidence. Mr. Simon could have testified from either of these documents, and could have given the cost values of merchandise turned over to the receiver. His books and bookkeeper were present in court, if he needed assistance. Thus a definite and accurate inventory readily could have been established, and the Court would have known at once what, if any, the shrinkage and losses were, and the result almost automatically would have determined the question of Mr. Simon's discharge. But he avoided this course, we may fairly assume, because it would have proved our charge of shrinkage and losses to be correct, and his discharge would then have been denied.

Again, with respect to Amended Specification I (c) calling on Mr. Simon to explain satisfactorily that none of the assets of the partnership had been used to acquire an interest in Opticon, no documentary evidence was produced by Mr. Simon to support his conclusions that he had assigned $52,000 of insurance on his life to Sadie Simon. No assignments of insurance policies, no checks evidencing the loan, nor the certificate of stock issued by Opticon, nor other corporate records, were offered.

The case at bar was, therefore, hopelessly in conflict with *In re Sperling* (C.C.A. 2, 1934) 72 F. (2d) 259, 261.

FOURTH. The Appeals Court in the Second Circuit has held that failure of the bankrupt to call as witnesses those who admittedly know important facts, renders the explanation under Sec. 14 c (7) unsatisfactory. See *Knetzer* v. *Larkin* (C.C.A. 2, 1949) 178 F. (2d) 532, 534, (next to last par.) and *In re Sperling* (C.C.A. 2 1934) 72 F. (2d) 259, 261, in which the court observed: "He (the bankrupt) could have called Solomon and the city marshal instead of basing his explanations on nothing more than his own unverified speculations". But, in the case at bar neither Herman Silver, in whose name the bankrupt's assets were purchased, nor the bankrupt's wife, were called to testify. Both must have known the facts.

FIFTH. The opinion is further in conflict with the decision in *Shapiro* v. *Ornish* in the 5th Circuit, 37 F. (2d) 407, affirming the District Court's judgment (D. C. Tex. 1939) 37 F. (2d) 403, 406, which, in the last paragraph on p. 406, defines "satisfactory explanation" under Sec. 14 c (7) of the Act, as removing all reasonable questions of doubt, so that, "he (the court) no longer wonders".

The issue thus becomes: Was the court reasonably "satisfied" with the explanation of Mr. Weinberg under specifications I (a) and I (b), and of Mr. Simon under specification I (c)? The following baffling questions demonstrate that the explanation failed to meet the test of the 5th Circuit: (1) Since the only evidence on the closing inventory shows it to have been $30,000 instead of $80,000, what became of the $50,000 of merchandise in the 8¼ months period? (2) Had it been given back as preferences to wholesalers, sold below costs, or had it been concealed by the bankrupt from the trustee and creditors of his bankrupt estate? (3) Again, with most of the scheduled debts accruing in the 8¼ months prior to bankruptcy,

and with gross sales amounting to $182,040.46 (Tr. 97) where were the cash proceeds of these sales at the time of bankruptcy? Should there not have been much more than the $3,400.00 of "cash on hand" which was concealed from the receiver? (4) If there had been no shrinkage in merchandise inventory, why did Mr. Simon not take the simple, direct method of testifying as to the cost value of the items listed in the Receiver's inventory, which would have proved beyond doubt that specifications I (a) and I (b) were, or were not, true? (5) Why did Mr. Simon fail either to admit or deny that he told Scalen he owned a 1/3 interest in Opticon? (6) If the $52,000 of insurance had been properly assigned to Sadie Simon, and if Simon himself actually had no interest in these policies or their loan values, or in Opticon purchased thereby, why did the bankrupt falsify his Schedule D-3-b, by inserting the word "None" after the inquiry "Policies of insurance"? (7) Why would Herman Silver, the certified public accountant ever invest $15,000 of his own cash in a bankrupt business which was still under the active management of the man who had caused the failure? (8) If Silver had not invested this $15,000 for himself, for whom was he holding title, if not for Mr. Simon? (9) Why were Mr. Silver and Mrs. Simon not called to testify? With the foregoing, and other lingering and perplexing unanswered questions the opinion of the court below holding the explanations satisfactory is clearly in conflict with the decision of the *In re Shapiro & Ornish* in the 5th Circuit.

The opinion below, if permitted to stand, defeats the intent of Congress in that it renders nugatory the seventh ground of objection to a bankrupt's discharge requiring a satisfactory explanation. On the contrary, as Mr. Justice Larned Hand, for the Court in *Federal Provision Co.*

v. *Ershowsky* (C.C.A. 2, 1938) 94 F. (2d) 574, 575, observed: "It would not be unduly severe to make the grant of all discharges conditioned upon such an explanation. After all, nobody is in better position to explain his losses than the bankrupt, and a discharge is a favor which ought to depend on his utmost candor and co-operation."

Wherefore Your Petitioner Respectfully Prays that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the Court of Appeals for the Seventh Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the foregoing entitled case, and that said judgment of the Court of Appeals for the Seventh Circuit may be corrected by this Honorable Court, and that your petitioner may have such other relief in the premises as to this Court may seem meet and just. And your petitioner will ever pray.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO.

In the Matter of RAY SIMON, Individually and RAY SIMON OPTICAL CO., etc., et al., Bankrupt,

---

ROSCOE BIFOCAL CO., INC., a corporation,

Petitioner,

vs.

RAY SIMON, Individually and as General Partner of RAY SIMON OPTICAL CO.,

Respondent.

APPENDIX

APPENDIX.

In the

United States Court of Appeals

For the Seventh Circuit

No. 11166. OCTOBER TERM, 1953, APRIL SESSION, 1954.

In the Matter of RAY SIMON, Individually and RAY SIMON OPTICAL Co., etc., *et al.*, Bankrupt.

ROSCOE BIFOCAL Co., INC., a corporation,

Appellant,

vs.

RAY SIMON, Individually and as general partner of RAY SIMON OPTICAL Co.,

Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before:

Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

Friday, October 1, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order or judgment of the said District Court entered on February 11, 1954 in this cause appealed from be, and the same is hereby, affirmed, with costs.

Thursday, November 18, 1954.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

OPINION.

October 1, 1954.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Appellant, a cred tor of Ray Simon, appellee, who was adjudged bankrupt o September 2, 1952, objected to the latter's discharge, fili g on March 19, 1953, its amended specifications, three in nu mber, I (a), I (b) and I (c), II (a) and II (b) and III. C n March 26, 1953, the referee in bankruptcy dismissed s pecifications I (c), II and III, leaving on file I (a) and (b) upon which, on March 31, 1953, he made findings of fact and conclusions of law, dismissing both. Upon review the D strict Court approved the referee's report and order, and directed the discharge to issue.

Upon appeal appellant urges that the refer e's findings and conclusions, approved by the court, were cl rly errone-ous and that certain facts in evidence const ute a good cause for denying the discharge, even thoug they were not included in any specification presented to he District Court. Appellee contends that the findings ar based upon ample supporting evidence and that the additi al grounds now urged by appellant may not be raised or the first time on appeal.

Specifications I (a) and I (b), with which one we are concerned, charged that the bankrupt had fail l to explain satisfactorily losses of and deficiencies in as ets, in that (1) an inventory of $80,030.38 at the beginning of the fiscal year, December 1, 1951, had, despite substanti l additional purchases of merchandise, shrunk to $22,346.7 and (2) the bankrupt had failed to include in his assets a interest in Opticon Corporation. The referee found that t e inventory

on December 1, 1951, was $80,030.38 and at the time of bankruptcy approximately $80,000; that no evidence had been introduced which showed any shrinkage or decrease between the two dates; that, during this period, the bankrupt lost approximately $11,000, which arose from an excess of costs over his gross profits on sales; that the bankrupt had not sustained any unexplained loss or deficiency in assets during the 8½ months' period, but that the loss mentioned resulted from the decline in gross sales and in net earnings during said period; that appellant's contention that at the time of bankruptcy the inventory was in fact $30,000 was not well founded; that that figure was not a cash inventory but the personal estimate of an accountant as to what the assets were worth on liquidation, even though they had cost $80,000; that the bankruptcy appraisal of $22,346.73 was made without reference to the cost of the merchandise, and that the bankrupt had not failed to explain satisfactorily any loss or deficiency in assets and had not been guilty of any act or failed to perform any duty which could justify denial of a discharge.

We have examined the record carefully and conclude that the evidence amply sustains the findings and conclusions of the referee and the trial court. Witnesses testified expressly to the facts recited in the referee's findings, and nothing impeaches their convincing testimony, except the inferences which appellant attempts to draw from them. Obviously it is not for us to accept such inferences or to draw them ourselves; it is for the trier of the facts, who sees and hears the witnesses, to pass upon their credibility and to adopt such inferences as may reasonably be drawn from the evidence. It matters not what we would have done; we cannot usurp the functions of the trial court. *In re Santos,* 211 F. (2) 887 (CA 7); *In re Garden City Brewery, Inc.,* 208 F. (2) 377 (CA 7); *In re Skrentny,* 199 F. (2) 488 (CA 7).

Appellant insists that the evidence indicates that the wife of the bankrupt acquired an interest in Opticon Corporation with funds supplied by her husband, and we assume that his contention is that this was an asset unaccounted for by the bankrupt. Unfortunately, the evidence does not justify such a postulate. The testimony of appellee was that he did not own any interest in Opticon and that the interest held by his wife was purchased by her with $3,600 borrowed by her on life insurance policies assigned to her in 1943.

One Scalen testified that in a telephone conversation, the bankrupt intimated that the latter had an interest in Opticon. However, his testimony was indefinite and uncertain, ending with the statement that he "could not swear to what he did tell me or did not tell me". Evidently the referee gave no credence to his testimony, but believed the truth lay in the bankrupt's explanation, for he expressly found that the bankrupt had not failed "satisfactorily to explain any deficiency of assets" or done anything to warrant denial of a discharge. With this resolution of disputed testimony we may not interfere.

For the first time on appeal, appellant argues that the bankrupt failed to schedule certain assets, viz., certain insurance policies assigned by him to his wife. Inasmuch as this specification was not presented to the trial court, it is not properly before us on review. *In re Waern Bldg. Corp.*, 145 F. (2) 584 (CA 7), cert. den. 324 U. S. 871; *In re Sound, Inc.*, 171 F. (2) 253 (CA 7), cert. den. 336 U. S. 962; *In re Grosse*, 24 F. (2) 305 (CA 7). If appellant desired to pursue the inquiry further than the bankrupt's unequivocal testimony in this respect, it was incumbent upon it to plead the matter in the trial court and avail itself there of such controverting evidence as it could procure from the insurance companies or elsewhere.

The judgment is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 574

IN THE MATTER OF RAY SIMON, individually and RAY SIMON OPTICAL CO., etc., et al.,

Bankrupts.

ROSCOE BIFOCAL CO., INC., a corporation,

Petitioner,

vs.

RAY SIMON, individually, and as general partner of RAY SIMON OPTICAL CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 574

IN THE MATTER OF RAY SIMON, individually and RAY SIMON OPTICAL CO., etc., et al.,

Bankrupts.

ROSCOE BIFOCAL CO., INC., a corporation,

Petitioner,

vs.

RAY SIMON, individually, and as general partner of RAY SIMON OPTICAL CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

INTRODUCTORY STATEMENT.

The petition for certiorari, hereinafter sometimes referred to as the petition, fails to comply with the requirements of Rule 23 of the Revised Rules of this Court. We have, therefore, included in this brief without comment or argument the statements required by the rules.

OPINIONS BELOW.

Contrary to the statement of petitioner, the opinion of the Court of Appeals was published in the Federal Reporter on December 13, 1954, and is cited as *Simon* v. *Simon,* 216 F. 2d 339. The orders of the referee and the district judge were not published but are set forth verbatim in the printed record (R. 25, 95-100, 106).

JURISDICTION.

The judgment of the Court of Appeals was entered October 1, 1954 and rehearing was denied November 18, 1954. Jurisdiction to review said judgment by writ of certiorari is conferred upon this Court by section 24c of the Bankruptcy Act, 11 U.S.C. 1952 ed., section 47c, volume 1, page 1030 and section 1254 of Title 28 of the United States Code, 28 U.S.C. 1952 ed. section 1254, volume 3, page 4182.

STATUTE INVOLVED.

This controversy involves Section 14c of the Bankruptcy Act, 11 U.S.C. 1952 ed. section 32c, volume 1, page 1025. It also involves General Order No. 47 of the General Orders in Bankruptcy, Supreme Court of the United States, 11 U.S.C. 1952 ed. following section 53, volume 1, page 1046 and Rule No. 52 (a) of the Federal Rules of Civil Procedure, 28 U.S.C. 1952 ed., rule 52 (a), volume 3, page 4334. Said statute, general order, and rule are set forth verbatim in the appendix hereto (Respondent's appendix, pp. 1a, 2a).

QUESTIONS PRESENTED FOR REVIEW.

1. Should this Court set aside an order of a referee in bankruptcy granting a discharge to a bankrupt when such order is supported by substantial evidence and ex-

tensive findings of fact, and which order was affirmed by the district judge and the Court of Appeals?

2. Was petitioner entitled to urge for the first time in the Court of Appeals grounds of opposition to discharge not included in any specification or other pleading presented to the referee or the district judge?

STATEMENT OF THE CASE.

On August 6, 1952, a voluntary petition in bankruptcy was filed in the United States District Court, for the Northern District of Illinois, Eastern Division, by respondent Ray Simon, individually, and by Ray Simon Optical Co., a limited partnership of which respondent was a general partner (R. 1). The jurisdiction of the district court was based upon Section 2 of the Bankruptcy Act, 11 U.S.C. 1952 ed., section 11, volume 1, pages 1019-1020. On September 2, 1952, respondent and the partnership were duly adjudged bankrupt pursuant to said Act.

On January 13, 1953, petitioner filed a specification (R. 6-8), setting forth the following five grounds of objections to discharge of the bankrupt:

I. The bankrupt partnership had failed to keep books and records from which its financial condition could be ascertained.

II. The bankrupt partnership had obtained credit by use of a materially false written financial statement.

III. Within twelve months prior to bankruptcy, the bankrupt Simon fraudulently concealed certain unspecified assets.

IV. Simon failed to explain an alleged shrinkage of assets of the bankrupt partnership.

V. Simon made false oaths in that:

(a) He scheduled certain liabilities as having been incurred in 1952 which were actually incurred in 1951.

(b) He denied owning an interest in Opticon Corporation.

On February 11, 1953, the bankrupts filed a motion to dismiss the above specification (R. 9-10), which motion was sustained on February 26, 1953, by order of the referee to whom said bankruptcy proceedings had been generally referred (R. 11). Pursuant to said order, the objecting creditor was given leave to file an amended specification on or before March 19, 1953.

On March 19, 1953, the objecting creditor filed an amended specification (R. 12-16) setting forth the following three grounds of objection to discharge:

I. The bankrupts had failed to explain satisfactorily losses of assets, or a deficiency of assets to meet the liabilities of either of them, in that:

(a) The inventory of the partnership at book value on December 1, 1951 was $80,030.38, whereas on August 6, 1952, the inventory was $30,000.00 according to the bankrupts' balance sheet (Obj. Cr. Ex. 13, R. 24, 51-52), and $22,346.73, according to the appraisal of Frank M. McKey.

(b) Based on the closing inventory figure of $30,000.00 above referred to, the bankrupt partnership sustained a loss of $63,381.94 during the period from December 1, 1951 to August 6, 1952.

(c) The bankrupt Simon had failed to explain an alleged oral statement allegedly made to an undisclosed third party that he owned a one-third interest in Opticon Corporation.

II. The bankrupts failed to keep adequate books and records in that:

(a) The books did not reflect the alleged loss of $63,381.94 hereinabove referred to.

(b) During the period from December 1, 1951 to August 6, 1952, the bankrupt partnership had issued twenty checks to cash.

III. The bankrupt Ray Simon committed an offense punishable by imprisonment in that he knowingly and fraudulently scheduled the claims of six creditors as having been incurred in 1952, whereas said claims were actually incurred in 1951.

On March 24, 1953, the bankrupts filed a motion to dismiss the amended specification (R. 16-18). On March 26, 1953, the bankrupts in support of their motion filed the affidavit of Rudolph O. Weinberg (R. 22-24) wherein the affiant stated that the balance sheet referred to in the amended specification (Obj. Cr. Ex. 13, R. 24, 51-52) was prepared by him while in the employ, and at the request, of Arthur P. Murphy the receiver appointed by the court. Weinberg further stated that at the request of the receiver he did not take a physical inventory but merely made a personal estimate of the liquidation value thereof. Attached to and made part of Weinberg's affidavit was a photostat of the balance sheet wherein the inventory valuation was specifically characterized as an estimate (R. 24).

On March 26, 1953, an order was entered by the referee sustaining the motion of the bankrupt to dismiss objections Nos. I (c), II and III and a hearing was set to consider the remaining objections I (a) and I (b) (R. 25).

Hearings were held by the referee on objections I (a) and I (b) on March 30 and March 31, 1953. At the con-

clusion of the objecting creditor's proof, the bankrupt moved to dismiss these remaining objections (R. 82). The referee stated that he was prepared to rule on the bankrupt's motion, but indicated that some explanation should be made in the record as to the ownership of Opticon Corporation. Accordingly, the referee overruled the bankrupt's motion for the sole purpose of obtaining such testimony (R. 83-84). The bankrupt Ray Simon, being then present in court, was thereupon called as a witness (R. 84). He testified that he did not own any interest in Opticon Corporation, but that his wife, Sadie Simon, using funds which she borrowed on certain insurance policies which had been assigned to her in 1943 or 1944, invested $3,600.00 in said corporation (R. 84-93).

At the conclusion of Simon's testimony, and after cross-examination by the petitioner, the referee concluded that the objecting creditor had failed to make out a case and thereupon sustained the bankrupt's motion to dismiss the remaining objections to discharge (R. 93-94). The referee entered an order containing extensive findings of fact and ordered that the motion of the bankrupt to dismiss the objections be sustained and the objections were thereupon dismissed (R. 95-100).

On April 30, 1953 the objecting creditor filed a petition for review of the orders entered by the referee on March 26 and 31, 1953 (R. 100-103). On February 11, 1954 the district judge denied the petition for review and affirmed the orders and findings of the referee (R. 106).

On March 12, 1954 the objecting creditor filed a notice of appeal from the order of the district judge (R. 107). On October 1, 1954, the United States Court of Appeals for the Seventh Circuit unanimously affirmed the district judge (Petitioner's appendix, pp. 23-24, 25-27). On November 18, 1954 a rehearing was denied by the Court of Appeals (Petitioner's appendix, p. 24).

ARGUMENT.

REASONS FOR DENIAL OF CERTIORARI.

I.

This cause involves no question of federal law which has not been decided by this Court.

It is apparent from the foregoing statement of the case and from the opinion of the Court of Appeals (Petitioner's appendix pp. 25-27) that this cause involves no novel questions of federal law, but is merely a routine controversy concerning the granting of a discharge in bankruptcy.

It will be noted that petitioner's original specification of objections to discharge (R. 6-8) included every ground permitted by the Bankruptcy Act, excepting only a prior discharge (Section 14 c (5)), and failure to obey a court order (Section 14 c (6)). By the time this cause reached the Court of Appeals, petitioner had abandoned all of its original grounds, except the alleged failure satisfactorily to explain losses or deficiency of assets (See opinion of Court of Appeals, petitioner's appendix, p. 25). In the Court of Appeals, petitioner for the first time attempted to urge an additional ground of objection, *viz.*, failure to schedule certain insurance policies (See opinion of Court of Appeals, petitioner's appendix, p. 27).

The Court of Appeals based its opinion on the following well-established propositions of law:

(a) Findings of fact made by a referee and affirmed by a district judge, when supported by substantial evidence, cannot be set aside on appeal.

(b) Points not urged before a referee or district judge cannot be considered for the first time on appeal.

The following authorities, and others too numerous to cite, establish beyond question that the findings of the referee, supported as they were by substantial evidence, and affirmed by the district judge, will not be set aside on appeal:

General Order No. 47, General Orders in Bankruptcy, Supreme Court of the United States, 11 U.S.C. 1952 ed., following Section 53, volume 1, page 1046 (respondent's appendix, p. 2a); Rule 52 (a), Federal Rules of Civil Procedure, 28 U.S.C. 1952 ed., rule 52a, volume 3, page 4334 (Respondent's appendix, p. 2a); *Manson* v. *Williams,* 213 U. S. 453, 455, 456, 457; *Boyce* v. *Chemical Plastics, Inc.,* 8 Cir., 175 F. 2d 839, 841-842, cert. den. 338 U. S. 828; *Wetzel* v. *Schaeffer,* 5 Cir., 124 F. 2d 308, 310, cert. den., 316 U. S. 678; In re *Santos,* 7 Cir., 211 F. 2d 887, 889; *Losey* v. *Losey,* 9 Cir., 204 F. 2d 684, 685; *Staunton Industrial Loan Corp.* v. *Wilson,* 4 Cir., 190 F. 2d 706, 708; *Gordon* v. *Woods,* 1 Cir., 189 F. 2d 76, 78; In re *Wolf,* 3 Cir., 165 F. 2d 707, 709-710; *Albinak* v. *Kuhn,* 6 Cir., 149 F. 2d 108, 111; *Morris Plan Industrial Bank* v. *Henderson,* 2 Cir., 131 F. 2d 975, 976-977; *Fish* v. *East,* 10 Cir., 114 F. 2d 177, 200.

The following cases make it clear that new points may not be raised on appeal:

Boyce v. *Chemical Plastics, Inc.,* 8 Cir., 175 F. 2d 839, 843, cert. den. 338 U. S. 828; In re *Sound, Inc.,* 7 Cir., 171 F. 2d 253, 255, cert. den. *sub nom. Atwell Building Corporation* v. *Sound, Inc.,* 336 U. S. 962; In re *Brown,* 2 Cir., 87 F. 2d 306, 308, cert. den. *sub nom. Hotel Syracuse Men's Shop* v. *Haight,* 301 U. S. 696; *Feick* v. *Stephens,* 6 Cir., 250 Fed. 185, 190, cert. den. *sub nom. Union Savings Bank & Trust Co. of Cincinnati* v. *Feick,* 248 U. S. 562; *Barlow* v. *Federal Land Bank of Berkeley,* 10 Cir., 139 F. 2d 96, 97; *United States* v. *Harris,* 9 Cir., 100 F. 2d 268, 276; *Huntley* v. *Snider,* 1 Cir., 86 F. 2d 539, 540; *Frederici*

v. *Fine,* 3 Cir., 34 F. 2d 284; *Household Supply Co.* v. *Whitaker,* 5 Cir., 236 Fed. 730, 731; *Shaffer* v. *Koblegard Co.,* 4 Cir., 183 Fed. 71, 72-73.

Clearly, this cause does not present any novel question which merits the consideration of the Supreme Court of the United States.

II.

The Court of Appeals neither misconstrued nor misapplied the proviso of Section 14 c (7) of the Bankruptcy Act.

It is noteworthy that Rule 19 of this Court does not specify the misconstruction of a statute as sufficient ground for granting the writ of certiorari. Also, it must be observed that the statutory provision which was supposedly misconstrued is not even mentioned in the opinion of the Court of Appeals. (Petitioner's appendix, pp. 25-27). Although this by itself is sufficient to refute petitioner's argument, we will nevertheless demonstrate that petitioner, and not the courts below, misconstrued and distorted Section 14c of the Bankruptcy Act, 11 U.S.C. 1952 ed. section 32c, volume 1, page 1025 (Respondent's appendix, p. 1a).

Section 14c as amended, provides that:

"The court shall grant the discharge unless satisfied that

* * *

(listing seven specified grounds for denial of discharge)

* * *

Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt had committed any of the acts which, under this subdivision, would pre-

vent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

To carry the burden of proof imposed by section 14c, petitioner was required to establish by a fair preponderance of evidence that the bankrupt partnership had sustained unexplained losses. In re *Leichter,* 3 Cir., 197 F. 2d 955, 958-959, cert. den. *sub nom. Dworsky* v. *Leichter,* 344 U. S. 914; In re *Schwartz,* 2 Cir., 135 F. 2d 362, 363; In re *Smatlak,* 7 Cir., 99 F. 2d 687, 689; *Shanberg* v. *Saltzman,* 1 Cir., 69 F. 2d 262, 263; In re *Milne,* 40 F. Supp. 89, 91-92; *Collier on Bankruptcy,* 14th Ed. volume 1, section 14.10, page 1293. Suspicious circumstances or speculation alone are not reasonable grounds and do not shift the burden. In re *Leichter,* 3 Cir., 197 F. 2d 955, 957, 958-959, cert. den. *sub nom. Dworsky* v. *Leichter,* 344 U. S. 914; In re *Milne,* 40 F. Supp. 89, 91-92; *Collier on Bankruptcy,* 14th Ed. volume 1, section 14.10, page 1293.

Under no reasonable construction can petitioner be said to have carried his burden of proof. In fact, the only objection to discharge properly before the referee involved the alleged shrinkage of inventory from $80,000.00 at cost in November, 1951 to $30,000.00 or $22,000.00 in August, 1952. The undisputed testimony of the witnesses called by the objector (R. 57, 78), established that the $30,000.00 and $22,000.00 valuations relied on by petitioner represented not cost, but estimated bankruptcy liquidation values; and that was precisely the conclusion of the referee (R. 99). The undisputed evidence further established (R. 62) and the referee so found (R. 96, 99) that the cost value of the closing inventory was approximately $80,000.00. On the undisputed evidence, therefore, it is apparent that petitioner failed to show by the required preponderance of evidence that reasonable

grounds exist for denial of the bankrupt's discharge. As a matter of fact, the evidence introduced by petitioner during the hearings before the referee clearly established that the objection was entirely without merit.

III.

The decision of the Court of Appeals in this cause does not conflict with the decision of any other Court of Appeals.

In the first portion of the argument, we demonstrated that the propositions relied on by the Court of Appeals in this cause had been followed in each of the ten principal judicial circuits of the United States. In his entire brief, petitioner has failed to cite one single authority to the contrary.

Petitioner nevertheless insists that a conflict of circuits is involved, citing the following: *Knetzer* v. *Larkin,* 2 Cir., 178 F. 2d 532, 534; In re *Sperling,* 2 Cir., 72 F. 2d 259, 260, 261; *Federal Provision Co.* v. *Ershowsky.*2 Cir., 94 F. 2d 574, 575; *Brenner* v. *Gaunce,* 9 Cir., 28 F. 2d 606; and *Shapiro & Ornish* v. *Holliday* (incorrectly cited by petitioner as *Shapiro* v. *Ornish*), 5 Cir., 37 F. 2d 407, affirming In re *Shapiro & Ornish,* 37 F. 2d 403. Petitioner cited these same cases in the Court of Appeals and in his reply brief in that court conceded that in each of these cited cases there was an admitted, undisputed shrinkage of specific assets; that in each there was a timely demand for an explanation, and that in each of these cases the only question before the court was the sufficiency of the bankrupt's explanation. Clearly, these citations are not in conflict with or even applicable to the present case where the undisputed evidence and the extensive findings of the referee, affirmed by the district judge, establish conclusively that there was no shrinkage whatsoever.

CONCLUSION.

This case involves nothing more than a routine question of discharge in a bankruptcy case. There were extensive hearings before the referee in bankruptcy who, at the conclusion thereof, made twenty-one separate findings of fact (R. 96-99) and dismissed the objections to discharge. The district judge and the Court of Appeals affirmed. No new or novel questions are involved and the decisions in all the circuits are uniformly in accord.

Respondent respectfully submits that no valid reasons have been presented for issuance of the writ of certiorari, and therefore the petition should be denied.

Respectfully submitted,

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APPENDIX.

1. *Bankruptcy Act, Section 14c.*

(c) The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title; or (6) in the course of a proceeding under this title refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he

has not committed any of such acts shall be upon the bankrupt.

2. *General Order No. 47, General Orders in Bankruptcy, Supreme Court of the United States.*

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

3. *Rule No. 52(a), Federal Rules of Civil Procedure.*

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 574

In the Matter of RAY SIMON, Individually and RAY SIMON OPTICAL CO., etc., et al., Bankrupt,

ROSCOE BIFOCAL CO., INC., a corporation,
Petitioner,

vs.

RAY SIMON, Individually and as General Partner of RAY SIMON OPTICAL CO.,
Respondent.

Petitioner's Reply to Respondent's Brief

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Petitioner's Reply to Respondent's Brief

To The Honorable The Justices of the Supreme Court of the United States:

I.

Respondent's brief (pp. 7 and 8) confuses and obscures two important issues before this Court: (1) that the Court below has misconstrued and misapplied the proviso of Sec.

14 c (7) of the Bankruptcy Act in holding that the burden rested on petitioner-objector to actually prove the charges of the specifications of objection to the bankrupt's discharge (instead of requiring merely a satisfactory showing that there were reasonable grounds for believing them to be true, as held by *Federal Provision Co.* v. *Ershowsky,* (C.C.A. 2, 1938) 94 F (2d) 574, 575; *Knetzer* v. *Larkin* (U.S.C.A. 2, 1949) 178 F (2d) 532, 534; and (2) it obscures the issue that the opinion below is in sharp conflict with decisions in the Second, Fifth and Ninth Circuits.

On p. 7, respondent discusses a false issue, contending that "in the Court of Appeals, petitioner for the first time attempted to urge an additional ground of objection," to the bankrupt's discharge, *i.e.,* concealment of assets. There is no basis in fact for this contention. Respondent did, however, succeed, as the opinion indicates, in confusing the court below. Actually, with respect to the concealment of the $52,000.00 of insurance from the court, the receiver, trustee and creditors, on which insurance his wife borrowed $3,600.00 to purchase an interest in Opticon Corporation immediately after bankruptcy, we made the same argument (although amplified) that we have advanced in footnote 8 (b), pp. 9 and 10 of our Petition. We argued that this concealment of his insurance by the bankrupt was an act of secrecy, along with other indicia of fraud set forth in the footnote, strongly indicating that Mrs. Simon was holding a $3600 interest in Opticon for the bankrupt in fraud of creditors, and that his explanation was, therefore, unsatisfactory under Sec. 14 c (7) of the Act.

The other concealment of $3400.00 "Cash on Hand", disclosed by the Ray Simon Optical Company Balance Sheet of Aug. 6, 1952 (the day of bankruptcy) (Tr. 24), although the facts were contained in the record, was not discovered by us until our briefs had been filed (footnote 6

p. 6 of Petition). In our oral argument we called this item to the Court's attention for the sole purpose of demonstrating conclusively that *Mr. Weinberg, the bankrupt's accountant and bookkeeper, was not testifying truthfully when he told the court that he had been employed by the receiver of the bankrupt estate to make up the balance sheet showing the liquidation value of the merchandise.* We argued that if he had been employed for that purpose the receiver would have, at least, examined the balance sheet. If he had seen it, the very first item "Cash on Hand $3400.00" would have caught his eye, he would have collected it, and it would have been listed as a receipt in his Report which was filed about three months later. (This Report is contained in the bound record in the Court below). At no time did we urge these facts of concealment by the bankrupt as grounds of objection to his discharge, for the simple reason that they were not discovered in time to include them in our specifications of objections.

On p. 7 of respondent's brief, his premise under subpoint (a), "Findings of fact made by a referee and affirmed by a district judge, *when supported by substantial evidence,* cannot be set aside on appeal," is not true without qualification. Such findings may always be set aside *if clearly erroneous.* Remington on Bankruptcy (1941 ed.) Vol. 8, Sec. 3798. Since the documentary evidence shows conclusively that Weinberg was not employed by the receiver to make up the balance sheet as of the day of bankruptcy, that balance sheet stands as one of the business records of the bankrupt concern, and its entries are admissions against that concern that the shrinkage of $50,000, and the losses of over $63,000 in 8¼ months occurred as charged in our specifications of objection, so that the findings of the referee were clearly erroneous.

In the second place, the portion of respondent's premise which we have italicized, *"when supported by substantial evidence"*, begs all questions as to the character of evidence required to render an explanation satisfactory under the Act. We have stated in our Petition that the opinion below is in sharp conflict with the decisions of the Second, Fifth and Ninth Circuits with respect to the character of evidence required. (Our Petition, pp. 12 to 19).

II.

Contrary to respondent's contention, Sec. 14 c (7) of the Bankruptcy Act did not require that petitioner show by a preponderance of the evidence that the bankrupt partnership had sustained unexplained losses.

According to the Second Circuit decisions handed down since 1926, (when the proviso was added by amendment) the objector is no longer required, in first instance, to prove the charges of his specifications by a preponderance of the evidence. This amendment merely requires that the "objector shall show to the satisfaction of the court *that there are reasonable grounds for believing*" that the situation requires the bankrupt "to explain satisfactorily," etc. Collier on Bankruptcy, 14 Ed. Vol. 1, Sec. 14.12, pp. 1292-3; *Federal Provision Co.* v. *Ershowsky* (C.C.A. 2, 1938) 94 F (2nd) 574, 575, par. "(1)" and "(4)"; *Knetzer* v. *Larkin* (U.S.C.A. 2, 1949) 178 F (2d) 532, 534. What better showing could have been made than to have produced the bankrupt's business records, the income tax return for 1951 (See Exhibit Vol. p. 1 for the inventory, and p. 2 for "Partners Capital Account"—$26,136.46) and the Ray Simon Optical Company Balance Sheet as of August 6th, 1952, the day of bankruptcy, (Tr. 24) showing the estimated value of the inventory to be $30,000.00, and "Partners Capital Accounts (Deficit) $37,245.48"? Comparing these documents, there was a shrinkage in inventory of $50,000.00, and a loss by

the partners of their original capital account of $26,136.46 and, in addition, a deficit at the close of the 8¼ months of $37,245.48, making a total loss of $63,381.94 in the short period of two thirds of a year.

With this showing the burden shifted according to the decisions of the Second Circuit, and the referee and the parties at the trial so regarded the burden as then being the bankrupt's (Tr. 55, 84). As a result, *the bankrupt thereupon had the burden* not merely of going forward with the evidence, but *of actually proving* that the shrinkage and losses had not taken place, and by evidence that would "really explain." (*Federal Provision Co.* v. *Ershowsky* (C.C.A. 2, 1938) 94 F (2d) 574, 575—par. "(4)"). But, instead *the bankrupt relied entirely on Weinberg's testimony that he had been employed by the receiver to make up the balance sheet to show the liquidating, and not the actual, value as of the day of bankruptcy,* which testimony is now conclusively shown by documentary evidence in the record to be false. Under the opinions of the *Federal Provision Co.* case, and *Knetzer* v. *Larkin* (U.S.C.A. 2, 1949) 178 F (2d) 532, 534, the bankrupt failed to carry the burden of proving that the losses and shrinkage did not occur, and his discharge under these decisions, and the proviso of the section, would have to be denied.

III.

Under the third section of his brief, respondent declines to discuss the conflict between the opinion of the Court below and the decisions of the Courts of Appeal of the Second, Fifth and Ninth Circuits as to the character of evidence required to render an explanation satisfactory under Sec. 14 c (7) of the Act. Instead, respondent takes the position that there was a dispute as to whether a loss of $63,000, and a shrinkage in inventory of $50,000 had occurred, as we charged in our specifications, and that,

therefore, our authorities were inapplicable. But respondent overlooks the fact that petitioner, as objector, having made the satisfactory showing required by the proviso, *the burden shifted, and there was no longer a dispute,* unless the bankrupt attempted to refute the loss and the shrinkage. Under the decisions of the Second, Fifth and Ninth Circuits, the bankrupt could not refute or explain, as he attempted to do, the loss and shrinkage satisfactorily (as required by the Act) by conflicting, inconsistent and incredible testimony (*Knetzer* v. *Larkin,* U.S.C.A. 2, 1949, 178 F. 2nd 532, 534; *In re Sperling,* C.C.A. 2, 1934, 72 Fed. 259, 260, 261). Nor would his explanation only in vague general terms be satisfactory. (*Federal Provisions Co.* v. *Ershowsky,* C.C.A. 2, 1938, 94 F. 2d 574, 575; *In re Sperling,* C.C.A. 2, 1934, 72 F. 2d 259, 260; *Brenner* v. *Gaunce,* C.C.A. 9, 1938, 28 F. 2d 606, 607). Nor would his testimony without documentary support be satisfactory under the decisions. (*In re Sperling,* C.C.A. 2, 1934, 72 F. 2d 259, 261). His failure, moreover, to call available witnesses who knew the facts, rendered his explanations unsatisfactory (*Knetzer* v. *Larkin,* C.C.A. 2, 1949, 178 F. 2d 532, 534; *In re Sperling,* C.C.A. 2, 1934, 72 F. 2d 259, 261). Finally, his explanation failed to "really explain" since it left many important existing lingering doubts as to the bona fides of transactions. (*Shapiro & Ornish,* D.C. Tex. 1929, 37 F. 2d 403, 406, affirmed by the Circuit Court of Appeals in 37 F. 2d 407).

Respondent's virtual admission of these sharp conflicts between the decision of the Court below, and the decisions of the Second, Fifth and Ninth Circuits with respect to the character of evidence that is required to render an explanation satisfactory under Sec. 14 c (7) of the Act would appear to be fatal to his case.

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